NO. 22554

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDMOND ELIJAH JENSEN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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JURISDICTION AND STATEMENT OF THE CASE

The appellant, Edmond Elijah Jensen was indicted along with John Smith, not an appellant herein, on June 28, 1967, by Federal Grand Jury for the Central District of California. 1/

Count Four of the indictment charges appellant Jensen and co-defendant John Smith unlawfully received, concealed and facilitated the concealment and transportation of 22.415 grams of heroin on February 28, 1967, in violation of Title 21, United States Code, Section 174. Count Five charges that on the same

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1/ C.T. 2; "C.T." refers to Clerk's Transcript of Proceedings.

date the defendants sold that amount of heroin to Agent William Jackson and an undercover assistant of the Federal Bureau of Narcotics, in violation of Title 21, United States Code, Section 174. Count Six charges that the defendants made such sale without obtaining a written order form from the purchasers, in violation of Title 26, United States Code, Section 4705(a) (C.T. 5-7).

Count Seven of the indictment charges that on or about March 8, 1967, appellant Jensen and defendant John Smith unlawfully received, concealed, and facilitated the concealment and transportation of 48.165 grams of heroin, in violation of Title 21, United States Code, Section 174. Count Eight charges that on the same date the defendants sold that amount of heroin to Agent William Jackson of the Federal Bureau of Narcotics, in violation of Title 21, United States Code, Section 174. Count Nine charges that the defendants made such sale without obtaining a written order form from the purchaser, in violation of Title 26, United States Code, Section 4705(a) (C.T. 8-10).

Counts One, Two, and Three of the indictment, which charged only defendant Smith, and dealt with violations of the Federal marihuana laws, were dismissed, on motion of the Government, prior to trial (C.T. 2-4, 16; R.T. 12-14).[2/]

Both defendants were arraigned on July 31, 1967, and both pleaded not guilty on August 21, 1967 (C.T. 11-12). On October 10, 1967, a bench trial was held as to both defendants,

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2/ "R.T." refers to Reporter's Transcript of Proceedings.

before the Honorable Peirson M. Hall, and the defendants were found guilty as charged in Counts Four, Five, Six, Seven, Eight and Nine of the indictment (C.T. 16).

On December 4, 1967, the appellant Jensen was convicted and sentenced to imprisonment for a period of five years as to Counts Four, Five, Seven, and Eight, all to run concurrent. A motion for acquittal as to Counts Six and Nine was granted at that time (C.T. 29).

Appellant filed Notice of Appeal on December 8, 1967 (C.T. 30).

The jurisdiction of the District Court is predicated on Title 21, United States Code, Section 174; Title 26, United States Code, Section 4705(a); and Title 18, United States Code, Sections 3231 and 3237.

This Court has jurisdiction under Sections 1291 and 1294, Title 28 of the United States Code.

STATUTES INVOLVED

Title 21, United States Code, Section 174, provides in pertinent part:

> "Whoever fraudulently or knowingly . . . receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any . . . narcotic drug after being imported or brought into the United States contrary to law . . .

shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000 . . . .

"Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

Title 26, United States Code, Section 4705(a), provides:

"It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in the pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate."

STATEMENT OF FACTS

Agent William Jackson of the Federal Bureau of Narcotics met with an informant and the defendant, John Smith, at Smith's home on February 27, 1967 at 6:30 p.m. (R.T. 31). At that time, Agent Jackson told Smith that he wished to buy an ounce of good heroin (R.T. 32). Defendant Smith made a very short telephone call, hung up, and said, "Let's go." All three left in the informant's vehicle and proceeded, at Smith's direction to the inter-

section of New Avenue and Garvey Boulevard in South San Gabriel (R.T. 33).

There they parked near an ice cream stand, and Smith walked over to a telephone booth. Then he came back to the car and asked Agent Jackson for the money. Agent Jackson gave him $360.00 and Smith walked around a corner, out of view (R.T. 33).

Approximately 20 minutes later, Smith returned, said that he had given the money to his man and that they would get delivery at the intersection of Hazard Street and City Terrace (R.T. 34).

They proceeded to that location and waited for an hour and a half, while nothing happened. Then, at Smith's direction, they drove back to the vicinity of New Avenue and Garvey Boulevard, and then to a house which Smith thought was his "man's" house but got no answer there, either (R.T. 34-35).

Smith then said to drive him home and not to worry about the money, that everything would be all right. He said that his "man" was a good friend of his and he was sure that delivery would be made the following morning (R.T. 53).

The next morning, the informant, Agent Jackson, and defendant Smith met at Smith's house at 9:00 a.m. (R.T. 36). Smith said he had talked to his man and everything was all right. They proceeded to Wabash and Evergreen Streets at Smith's direction, and Smith then got out and disappeared from view (R.T. 36).

About 10 minutes later, Smith was observed to get out of a light grey Hillman which had driven up and parked across the street, and was being driven by the defendant, Edmond Elijah

Jensen (R. T. 36).

The Hillman then drove from the area after Smith got out. Smith walked over to Jackson and handed him the heroin charged in Counts Four, Five, and Six of the indictment (R. T. 36 and 43).

Agent Jackson drove Smith home, met with the surveilling agents and searched the informant (R. T. 37).

Agent Jackson next called defendant Smith on March 8, 1967 and said he wished to buy two ounces of heroin and that he wanted to meet Smith's "man". Smith replied that this man, whose name was "Edmond" had been very good to Smith, and that Smith did not therefore want to introduce Jackson to him (R. T. 39).

Jackson then arranged to buy the two ounces in the same manner as in the previous transaction (R. T. 39).

That evening, Jackson drove over to Smith's house, not accompanied by the informant or anyone else (R. T. 39-40). Smith made a phone call and then left and drove again to New Avenue and Garvey Boulevard in South San Gabriel, where they again parked near the ice cream stand (R. T. 40).

Shortly after they arrived, Smith looked across the street and said, "There he is." In the parking lot of a Shell Station sat the same Hillman which had been seen on the previous occasion, and the defendant Jensen was standing on the passenger side by the front of the vehicle (R. T. 40).

Smith then asked Jackson for the money, and he was handed $640.00. Whereupon, Smith then said, "I am not going to come back across the street after I get the stuff. You drive

over and pick me up." (R. T. 40).

Smith then left Agent Jackson's vehicle and joined defendant Jensen at the side of the Hillman, where they had a short conversation. They parted, Jensen re-entered the Hillman, Smith walked to the men's room of the Shell Station, stayed a very short while, and then walked to the corner of Garvey Boulevard and New Avenue (R. T. 40 and 43).

Agent Jackson drove his vehicle to that intersection and picked up defendant Smith who immediately handed him the heroin charged in Counts Seven, Eight, and Nine of the indictment (R. T. 41).

At the trial, Agent William Coonce testified that he was a surveilling agent at the time of the alleged transactions. On February 27, 1967, he observed defendant Smith make a telephone call near an ice cream store, and then get back into the informant's vehicle (R. T. 57).

Agent Coonce then observed a white, 1960 Falcon drive very slowly around the corner while its driver looked at the informant's vehicle and its occupants (R. T. 57).

Agent Coonce then took up a walking surveillance. He followed defendant Smith approximately a block and a half down the street, whereupon defendant Smith turned around and started walking toward Agent Coonce. At the same time, Agent Coonce again observed the 1960 Falcon now come toward Agent Coonce and turn in directly behind him. At this time, the driver of the Falcon was approximately five feet behind the agent (R. T. 57).

Agent Coonce observed the driver to be defendant Jensen (R. T. 58).

Agent Coonce was the surveilling agent again the following day. He was called by the informant who told him defendant Smith had explained to the informant that Smith had waited at the wrong intersection the night before for his source of supply to arrive, and that he had again talked to the source of supply, who was ready to deal that morning (R. T. 60).

On February 28, 1967, Agent Coonce, on surveillance, observed defendant Smith get out of the informant's and Agent Jackson's vehicle and proceed down Wabash Street. At this time, a gray Hillman appeared, and was being driven by the same person whom Agent Coonce saw driving the white Falcon the previous evening, namely defendant Jensen (R. T. 61).

Defendant Jensen picked up defendant Smith, turned around, and drove back to where the informant and Agent Jackson were waiting. Defendant Smith then got out of the car driven by defendant Jensen and re-entered the informant's vehicle (R. T. 61).

On the March 8, 1967 transaction, Agent Coonce instructed Agents Walker and Westrate to drive to a residence in Monterey Park, the address of which Agent Coonce had determined from the license plate registration of the Hillman he had observed on the February 28, 1967 transaction (R. T. 67).

At the same time as Agent Coonce was watching defendant Smith and Agent Jackson leave the residence of defendant Smith, the Hillman drove out of the driveway of the residence being

watched by Agents Walker and Westrate (R. T. 67-68).

Agents Coonce and Krueger followed defendant Smith to the intersection of New and Garvey, while Agents Walker and Westrate followed the Hillman to the same intersection. The Hillman then parked at the northwest corner, and defendant Jensen stood beside it (R. T. 68). Agent Coonce noted that it was the same defendant Jensen he had observed on the previous occasions in the white Falcon (R. T. 68).

Defendant Smith got out of the Government vehicle, crossed the street, and met with defendant Jensen where they held a short conversation (R. T. 68).

Defendant Smith then entered the restroom of the Shell Service Station where the Hillman was parked, and defendant Jensen left in the Hillman (R. T. 68).

The Hillman then proceeded back to the residence from which it had come, and the garage door closed (R. T. 68).

Meanwhile, defendant Smith and Agent Jackson were being followed back to defendant Smith's residence with the heroin charged in Counts Seven, Eight and Nine (R. T. 69).

On neither February 28, nor March 8, did defendant Smith or defendant Jensen request a written order form from Agent Jackson as required by law (R. T. 41).

At the trial, appellant Jensen produced no witnesses or testimony on his own behalf.

ARGUMENT

I

NO ERROR WAS COMMITTED BY CONSIDERING EVIDENCE THAT CO-DEFENDANT STATED, OUT OF PRESENCE OF APPELLANT, THAT APPELLANT WAS HIS "MAN", WHERE A COMMON SCHEME OR PLAN WAS PROVED.

Appellant contends first that the trial judge "made the mistake of considering a mass of evidence, a great deal of which was admissible only against the co-defendant Smith." (Appellant's Opening Brief, page 9).

Apparently, appellant refers to several references in the testimony wherein the defendant Smith spoke of obtaining the heroin from his "man" (R. T. 34-36) whose name was "Edmond" (R. T. 39). When appellant arrived on the scene the co-defendant, out of his hearing, pointed to appellant and said, "There he is." (R. T. 40).

Though a continuing objection was sustained by the court as to those statements made out of the presence of appellant, assuming, for the sake of argument, that the court did consider this evidence against appellant, such consideration would not be improper. The testimony showed that immediately before producing the heroin on both occasions, the co-defendant Smith took the money from the narcotics agents and had a conversation with Jensen. On the second occasion, narcotics agents on surveillance followed Jensen from his own house to the meeting area, and then

back to his house again, without Jensen making any other stops or showing any other reason for the trip. These meetings and conversations between Smith and Jensen show that a plan existed between them, and permit the use of Smith's statements during the course of that plan against Jensen, despite the absence of a conspiracy charge in the indictment. As the court stated in United States v. Olweiss, 138 F.2d 798 (2d Cir., 1943), at page 800:

> "The notion that the competency of the declarations of a confederate is confined to prosecutions for conspiracy has not the slightest basis; their admission does not depend upon the indictment, but is merely an incident of the general principle of agency that the acts of any agent, within the scope of his authority, are competent against his principal."

The test as to whether or not the statements and admissions of a co-defendant may be used against a defendant was laid down in Hitchman Coal and Coke Co. v. Mitchell, 245 U.S. 229 (1917), at page 249, where the court said:

> "In order that the declarations and conduct of third parties may be admissible in such a case, it is necessary to show by independent evidence that there was a combination between them and defendants, but it is not necessary to show by independent evidence that the combination was criminal or otherwise unlawful." (emphasis added)

The case of Ong Way Jong v. United States, 245 F.2d 392 (9 Cir., 1957), is factually distinguishable. There, the court pointed out that, "It is conclusively shown that Wee had many sources of supply. It is firmly established in the evidence that on the sale by Wee of narcotics on January 23, 1956 (Appellant) Ong was not the supplier or 'connection' of Wee. More striking still is the fact that on the sale of narcotics by Wee on February 21, 1956, Ong was not the supplier or 'connection' of Wee. If there is anything which is proved by circumstantial evidence, it would seem to be that Ong was not the supplier of narcotics for the sale made by Wee on February 1, 1956." (page 395) In the instant case, on the other hand, Jensen was the only possible source of heroin supply, under the evidence, for defendant Smith. And, there being independent evidence of combination between Smith and Jensen on both occasions of sale, the statements of Smith made during the course of that combination would be admissible against Jensen. Lutwak v. United States, 344 U.S. 604 (1953).

II

CIRCUMSTANTIAL EVIDENCE IS SUFFICIENT TO CONVICT DEFENDANT JENSEN, EVEN WITHOUT SMITH'S DECLARATIONS, WHERE THE GOVERNMENT DID NOT SEARCH THE CO-DEFENDANT SMITH.

In the above case where defendant Smith had to go somewhere else for the heroin and never was able to produce it without first meeting with defendant Jensen; and where defendant Jensen

was seen driving around in the 1960 Falcon on February 27, looking the situation over, and then appearing in a Hillman on February 28 and briefly meeting with defendant Smith just before Smith was able to produce the heroin, there is sufficient evidence to support the conclusion that defendant Jensen was defendant Smith's source of supply, even without using the evidence that Smith pointed across the street to Jensen and said, "There he is." And even more incriminating evidence exists on the subsequent March 8 transaction, when two surveilling agents staked out defendant Jensen's residence, saw him leave in the Hillman, followed him to the meeting with defendant Jensen, and then followed him right back to his garage, while defendant Smith was delivering the heroin to the other agents. What other reasonable explanation was offered for this excursion?

Circumstantial evidence, is of course, competent for conviction under this statute. See Rodella v. United States, 286 F.2d 306, 312 (9th Cir., 1960), and the cases cited therein.

Appellant cites People v. Ollado, 246 Cal. App. 2d 608 (1966); Dear Check Quong v. United States, 160 F.2d 251 (D.C. Cir. 1947); Panci v. United States, 256 F.2d 308 (5th Cir., 1958); United States v. Rossi, 219 F.2d 612 (2d Cir., 1955); People v. Barnett, 118 Cal. App. 2d 336 (1953); and Gutierrez v. United States, 314 F.2d 334 (5th Cir., 1963), as standing for the proposition that unless Smith was searched by the agent, prior to leaving the automobile, a conviction against Jensen ought not to stand. These cases deal with informant purchases, not purchases by defendants who are

attempting to sell narcotics and are not out to "make a case" on another individual. To require that a narcotics agent, working undercover, search a defendant before the defendant leaves to pick up the heroin he's been paid for, would be contrary to common sense.

CONCLUSION

A review of the entire record indicates no error prejudicial to the rights of appellant and, accordingly, the judgment below should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ William J. Gargaro, Jr.
WILLIAM J. GARGARO, JR.